

No. 01-3934

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CHARLES “SPIKE” GIRTY, CHARLES GIRTY, and VICKY GIRTY,

Plaintiffs-Appellees

v.

SCHOOL DISTRICT OF VALLEY GROVE,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING APPELLEE AND URGING AFFIRMANCE

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STATEMENT OF RELATED CASES

There are no related cases in this Court.

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INTEREST OF THE UNITED STATES

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400-1419, created a federal grant program that provides funding to States for special education of children with disabilities. Under Part B of the IDEA, Congress provides funding to state educational agencies, and through them to local educational agencies, “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. 1400(d)(1)(A). The IDEA

requires that children with disabilities be educated in the “least restrictive environment” (LRE):

To the maximum extent appropriate, [states must ensure that] children with disabilities * * * are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. 1412(a)(5)(A). Congress charged the United States Department of Education to administer the IDEA. The Department has issued regulations to implement the LRE requirement, see 20 U.S.C. 1417(b) and 34 C.F.R. 300.550-300.556, and has published numerous statements of policy guidance to assist States in complying with the Act.

This appeal raises important questions involving the implementation of the LRE requirement. The United States has a strong interest in the correct interpretation and application of the IDEA and its regulations so that Congress’s intent that children with disabilities be educated in the LRE is given effect by States receiving federal funding. The United States has filed amicus briefs in several IDEA cases. See, *e.g.*, *Cedar Rapids v. Garret F.*, 526 U.S. 66 (1999); *Board of Educ. v. Rowley*, 458 U.S. 176 (1982); *Birmingham v. Omaha Sch. Dist.*, 220 F.3d 850 (8th Cir. 2000); *Sacramento City Unified Sch. Dist. v. Holland*, 14 F.3d 1398 (9th Cir.), cert. denied, 512 U.S. 1207 (1994).

**STATEMENT OF
SUBJECT MATTER AND APPELLATE JURISDICTION**

The district court had jurisdiction pursuant to 28 U.S.C. 1331 and 28 U.S.C. 1343(a). The district court entered its final judgment on September 17, 2001, and the School District of Valley Grove (Valley Grove) noted a timely appeal on October 16, 2001. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

Whether the district court correctly determined that Valley Grove failed to demonstrate that Charles “Spike” Girty, a child with a disability, could not be educated satisfactorily in a regular education setting with supplementary aids and services.

**STATEMENT OF FACTS, COURSE OF PROCEEDINGS, AND
DISPOSITION BELOW**

Charles, Vicky, and Spike Girty commenced this action by filing a complaint alleging that Valley Grove failed to provide a free and appropriate public education in violation of the IDEA when it proposed an individualized education program (IEP) that would transfer Spike from a regular classroom in his neighborhood school to a life skills support classroom in a school in another district. The parties filed cross-motions for summary judgment. The court entered summary judgment for the Girtys, finding that Valley Grove had failed to demonstrate “that Spike could not be educated satisfactorily in a regular education setting with

supplementary aids and services.” *Girty v. School Dist. of Valley Grove*, 163 F. Supp. 2d 527, 536 (W.D. Pa. 2001).

A. *The Individuals with Disabilities Education Act.*

The central purpose of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. 1400(d)(1)(A). The IDEA provides federal financial assistance to assist the States “to provide special education and related services to children with disabilities.” 20 U.S.C. 1411(a)(1). In order to qualify for this assistance, a State must demonstrate to the Secretary of Education, *inter alia*, that it has in effect policies and procedures to ensure that a FAPE “is available to all children with disabilities,” 20 U.S.C. 1412(a)(1), and that the child is educated in the LRE. 20 U.S.C. 1412(a)(5)(A).^{1/}

^{1/} Educating children with disabilities in the regular class with supplementary aids and services is often referred to as “mainstreaming” or, more recently, “inclusion.” See this Court’s decision in *Oberti v. Board of Educ.*, 995 F.2d 1204, 1207 n.1 (1993). See also, *Girty*, 163 F. Supp. 2d at 528 n.1. Educators often use the terms interchangeably. The Department of Education uses the term from the Act -- “least restrictive environment” -- see 34 C.F.R. 300.550, to emphasize the requirement that children with disabilities be educated in the regular classroom to the maximum extent appropriate. “As the [Pennsylvania] Department [of Education] uses the term, ‘inclusion’ is synonymous with what is sometimes called ‘supported inclusion,’ because the term implies that the student and teacher will receive the supports they need.” *Basic Education Circular: Inclusion of Special Education*

“As numerous courts have recognized, this provision sets forth a ‘strong congressional preference’ for integrating children with disabilities in regular classrooms.” *Oberti*, 995 F.2d at 1213-1214 (citations omitted). To implement this congressional preference, the Department of Education has promulgated regulations that require school districts to ensure that:

(b) The child’s placement * * * (3) Is as close as possible to the child’s home; (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled; (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and (e) *A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.*

34 C.F.R. 300.552 (emphasis added).

Congress defined FAPE to mean:

special education and related services that--(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. 1401(8). “[S]pecial education” is defined as “specially designed instruction, at no cost to parents, to meet the *unique needs* of a child with a

(...continued)

Students (Penn. BEC) at 2 (Penn. Dep’t of Educ. Sept. 1, 1997). This document was attached to the Girtys’ motion for summary judgment filed in the district court and is included as an addendum to this brief.

disability.” 20 U.S.C. 1401(25) (emphasis added). The IDEA requires States to provide as “related services” all services “as may be required to assist a child with a disability to benefit from special education.” 20 U.S.C. 1401(22). The State of Pennsylvania recognizes that “[i]nclusion is not a dumping of students in a regular class without special supportive services. Special [education and related] services, referred to in law as ‘supplementary aids and services,’ are at least as important to student[s] with disabilities in regular classes, if not more important, than such services are to students with disabilities in segregated settings.” *Penn. BEC* at 3.

The IDEA requires the local educational agency to ensure that each child with a disability receives FAPE through an individualized education program (IEP). 20 U.S.C. 1401(11) and 1414(d); 34 C.F.R. 300.340-300.350. The IEP must include statements that summarize the child’s present abilities, measurable annual goals and progress (including benchmarks or short-term objectives), special education and related services, and “program modifications or supports” the child needs in order to, *inter alia*, “be educated and participate with other children with disabilities and nondisabled children.” The IEP must also explain “the extent, if any, to which the child will not participate with nondisabled children in the regular class.” 34 C.F.R. 300.347.

The IDEA also guarantees to children and their parents certain procedural safeguards to ensure the provision of FAPE, including the right to an impartial hearing by the local educational agency when the parents disagree with the proposed IEP. 20 U.S.C. 1415(f). The State may choose, as Pennsylvania has, to

require review of the local agency's decision by a state agency. 20 U.S.C. 1415(g). The Act further permits any party aggrieved by the final decision "to bring a civil action * * * in any State court of competent jurisdiction or in a district court of the United States." 20 U.S.C. 1415(i)(2).

In *Oberti*, this Court adopted a two-prong test for determining whether a school is in compliance with the IDEA's LRE requirement. The first prong of the test requires a court to determine whether "education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily." *Oberti*, 995 F.2d at 1215 (citation omitted). Analysis of this prong requires consideration of three factors: (1) whether the school has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular classroom with supplementary aids and services, as compared to the benefits provided in a segregated special education classroom; and (3) the possible negative effect the child's inclusion may have on the education of the other children in the regular classroom. *Id.* at 1217-1218. If it is determined that placement outside the regular classroom is required, then the court must address the second prong of the test, which is whether the school has "mainstreamed the child to the maximum extent appropriate." *Id.* at 1215 (citation omitted). This analysis requires an inquiry into whether the school has made efforts to include the child in school programs with non-disabled children whenever possible. *Ibid.*

B. *Facts.*

1. *Background.*

Charles “Spike” Girty, born July 11, 1987, functions within the moderate range of mental retardation and therefore qualifies for special education and related services under the IDEA (A360).^{2/} Spike’s parents expressed concern with their child’s education in the fall of 1995 because Spike, who was then eight years old, was being educated in a fifth and sixth grade program at Sugarcreek Intermediate School that was not age-appropriate for him. Spike was subsequently moved to Rocky Grove Elementary School, the school he would have attended if not disabled, where he attended a life skills classroom (for disabled students only) for academic subjects and was included in the regular classroom for non-academic subjects in second and third grade (A40-41).

When Spike was in third grade, his parents requested greater inclusion. Prior to a scheduled due process hearing, Valley Grove agreed to develop an IEP placing Spike in an age-appropriate regular education classroom. The following school year (1997-1998), Spike was placed full-time in a regular education fourth grade classroom at Rocky Grove. An aide was assigned to work with him on his life skills goals, including social skills. Spike moved to Sugarcreek for fifth grade, again the school he would have attended if not disabled, where he received his education pursuant to a similar IEP (A41).

^{2/} “A” followed by a number refers to a page in the Appendix filed with the Court on May 6, 2002.

When Spike was in sixth grade, Valley Grove proposed changing his placement from full-time regular education to a part-time life skills support (LSS) classroom (A41, 49). Valley Grove does not operate its own LSS classroom, but is part of a consortium of schools in an Intermediate Unit.^{3/} Therefore, the proposed change would remove Spike from Sugarcreek and place him in a school approximately ten miles away in another district (A221-222). Spike's parents objected to the recommendation and requested a hearing pursuant to 20 U.S.C. 1415(f).

2. Decision of the Hearing Officer.

The hearing officer received testimony from various school employees, including the school psychologist and coordinator of special education, the sixth grade Language Arts and Math teachers who had Spike in their classes, the school principal, and Spike's aide. The officer also heard testimony from a life skills support teacher and an instructional advisor from the Intermediate Unit. Spike's parents presented their own testimony and that of a psychologist certified in school psychology whom they had retained.

The hearing officer analyzed the evidence under *Oberti* and determined that Valley Grove had failed to show that Spike could not be educated in the regular classroom with supplementary aids and services (A415). The hearing officer

^{3/} Pennsylvania is divided into a number of Intermediate Units (IU) through which groups of school districts operate special education programs. 24 Pa. Cons. Stat. 9-951; 9-958.

recognized, as argued by Valley Grove, that Spike would not be able to handle the sixth grade curriculum, but held that

[f]or Spike to be included in regular classes is not about him being able to keep up scholastically with the other students, it is about being part of the classroom. In order to accomplish this in a meaningful way, the focus of training needs to be on the instructional and supporting staff on inclusive practices.

(A419-420).

The hearing officer concluded that: “(1) The District’s recommended placement in a LSS classroom is not in accordance with the LRE requirement. Spike’s IEP is to be delivered in an inclusive education setting. (2) The District is to provide timely training for its staff in inclusive practices” (A421).^{4/}

3. Decision of the Appeals Panel.

Valley Grove appealed the hearing officer’s decision to the State educational agency Due Process Appeals Review Panel (Appeals Panel), which reversed the decision of the hearing officer (A428). The Appeals Panel focused on the fact “that the sixth grade regular academic curriculum is so far beyond [Spike’s] instructional level, it cannot be modified or adapted to meet his needs” (A427). The Appeals Panel found that Valley Grove complied with the Act’s LRE requirement, despite

^{4/} The hearing officer found that Spike had not been educated in an inclusive manner under his old IEP as the IDEA requires, and concluded that Valley Grove “has not demonstrated the provision of supplementary aids and services in order for Spike to be meaningfully included in the regular classes under *Oberti*. Furthermore, the District did not show that it had provided sufficient training for the regular education teachers in inclusion in accordance with 34 C.F.R. § 300.555” (A419) (citations to Administrative Record omitted).

Spike's removal from classes with non-disabled children, because the new IEP provided: (1) regularly scheduled consultations between Spike's aide and an IU life skills teacher; (2) appropriate instructional materials and methods to the aide; and (3) inservices and consultations on inclusion for the regular classroom teachers (A428). The Appeals Panel did not make a finding on the first prong of the *Oberti* test: whether Spike could be appropriately educated under the new IEP in the regular classroom with the use of supplementary aids and services. Instead, the Appeals Panel skipped to the second prong of the *Oberti* test and concluded that "the placement proposed by the District is the least restrictive appropriate placement for [Spike]" (A428). Paradoxically, it also reminded Valley Grove

that the appropriate educational program is one that is presented by a certified special education teacher and not by a paraprofessional aide. While the manner in which the instruction was delivered was not raised as an issue in these proceedings, the record nevertheless establishes that this requirement has been routinely ignored during the time [Spike] has been fully included in regular education.

(A428) (citing State statutes).

4. *Decision of the District Court.*

Relying solely on the administrative record created before the hearing officer (neither party chose to submit additional evidence to the Appeals Panel or district court), both parties filed motions for summary judgment. *Girty*, 163 F. Supp. 2d at 528. In its decision, the court outlined the analysis mandated by *Oberti*. *Girty*, 163 F. Supp. 2d at 533. The court also recognized the obligation to accord due weight to the administrative proceedings: "[W]hen the appeals panel reverses the hearing

officer, as is the case here, the due weight obligation applies to the appellate proceedings so long as non-testimonial, extrinsic evidence justifies the appeals panel's contrary decision." *Id.* at 534.

The court then applied the *Oberti* analysis to the facts. The court reviewed Valley Grove's past efforts to accommodate Spike in regular education under the old IEP. The court found that the evidence presented to the hearing officer demonstrated a number of shortcomings in Spike's education, and held that, because of these shortcomings, Valley Grove failed properly to consider including Spike in regular education with supplementary aids and services when it prepared the new IEP. The court noted that "every school official, teacher and expert who testified indicated that Spike made academic progress in regular education," *id.* at 535, and found that Spike's social skills improved when he was placed with non-disabled children. *Ibid.*

The court found that the Appeals Panel justified its conclusion that Spike's placement in a separate classroom for core courses, with only children with disabilities, on an improper factor: its finding that the sixth grade regular academic curriculum was so far beyond Spike's level that it could not be modified to meet his needs. The court also found that the Appeals Panel failed "to take into account the undisputed testimony that Spike did in fact progress both academically and socially in regular education and was achieving at a level appropriate for him." *Id.* at 536.

[T]he relevant focus is whether Spike can progress on his IEP goals in a regular education classroom with supplementary aids and services, not whether he can progress at a level near to that of his non-disabled peers. Thus, the Appeals Panel's focus on the gap between Spike's abilities and the demands of the sixth grade curriculum was erroneous.

Ibid. (citation omitted). The court found that Valley Grove's position that Spike could not be included in a sixth grade class was based on the opinions of teachers who

were never adequately trained in modification techniques or methods. There was substantial testimony from the Plaintiffs' expert that simple techniques exist which could be used to facilitate Spike's inclusion in regular education instruction. * * * Given that these methods have not been attempted and that Spike has progressed in regular education even without appropriate supplements, we find that Spike would receive adequate educational benefit in a regular education setting with appropriate supplementary aids and services.

Ibid. The court found that Spike was not disruptive, and that his presence in the regular education classroom also benefitted non-disabled students. *Ibid.*

The court concluded, based on the IDEA's LRE requirements and Department of Education regulations, that Valley Grove had not established "that Spike could not be educated satisfactorily in a regular education setting with supplementary aids and services." *Ibid.* The court remanded the case for Valley Grove to reconsider its proposed IEP under proper standards. *Id.* at 537.

SUMMARY OF ARGUMENT

The district court correctly held that the placement in a LSS classroom that Valley Grove proposed would not educate Spike in the least restrictive

environment, as required by the IDEA, properly analyzing the case pursuant to the IDEA and this Court's precedent. Contrary to the decision of the Appeals Panel, and Valley Grove's argument, the IDEA does *not* require that Spike be able to perform at or near the grade level of non-disabled students before placement in the regular class can be considered the LRE for him. The IDEA requires only that Spike be able to receive educational benefits when he is in the regular class, and that the benefits he receives when in the regular class with supplementary aids and services not be far outweighed by the benefits he would receive in a self-contained segregated setting.

Congress expressed a strong preference in favor of educating children with disabilities in an inclusive manner and an integrated environment and requires States accepting IDEA funds to educate children with disabilities in the least restrictive environment (i.e., with their nondisabled peers in the regular classroom) to the maximum extent appropriate. States and school districts are not asked to determine whether LRE is an appropriate policy but rather to determine how a child can be educated in the LRE. Thus, school districts must determine how a child can be educated in the regular class with the use of supplementary aids and services. Valley Grove did not even attempt to make the necessary determination of how Spike could be educated in the LRE. Indeed, Valley Grove argues instead that, directly contrary to IDEA regulations, Spike must be removed from his age-appropriate regular classroom solely because his educational level is below that of the class. See 20 U.S.C. 1412(a)(5)(A) and 34 C.F.R. 300.552(e).

The district court found that because Valley Grove did not make a meaningful attempt to instruct Spike inclusively under his old IEP, it failed properly to consider including Spike in the regular classroom with supplementary aids and services when it prepared the new IEP. The court also found, and it was not controverted, that Spike made academic progress in the regular classroom, and that Spike's presence would not significantly impair the education of the other students in the regular class. These findings are not clearly erroneous.

Finally, the district court did not abuse its discretion in the weight it gave to the administrative proceedings. Due weight requires that the district court explain its reasons for adopting or not adopting the administrative findings, which it did. The court correctly rejected the Appeals Panel's legally erroneous holding and agreed with the hearing officer that Valley Grove had not made reasonable efforts to develop an IEP for Spike that ensured compliance with the IDEA's LRE requirement.

STANDARD OF REVIEW

This Court exercises "plenary review over the district court's conclusions of law and review[s] its findings of fact for clear error." *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 526 (3d Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

Appeals panels reviewing the fact findings of hearing officers in two-tier schemes (such as Pennsylvania's) exercise plenary review, except that they should defer to the hearing officer's findings based on credibility judgments unless the non-testimonial, extrinsic evidence in

the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion.

Id. at 529. “A district court should * * * give ‘due weight’ to the appeals panel’s decision when it reverses the hearing officer’s conclusions of law, inferences from proven facts, and factual findings based on credibility judgments where non-testimonial, extrinsic evidence justified the appeals panel’s contrary decision.”

Ibid. “We assume, without deciding that * * * a district court should accord somewhat less consideration to an appeals panel ruling that disregards a hearing officer’s credibility judgments where this standard is not met.” *Ibid.* n.4.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY FOUND THAT THE APPEALS PANEL APPLIED AN INCORRECT LEGAL STANDARD WHEN IT HELD THAT SPIKE COULD NOT BE PLACED IN A REGULAR CLASSROOM SIMPLY BECAUSE HE COULD NOT DO GRADE-LEVEL WORK

A. *Children with Disabilities May Be Removed from the Regular Education Classroom Only When Education in Regular Classes with the Use of Supplementary Aids and Services Cannot Be Achieved Satisfactorily.*

In the IDEA, Congress established a strong statutory presumption that children with disabilities will be educated in a regular classroom with non-disabled children. “[R]emoval of children with disabilities from the regular educational environment occurs *only* when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and

services cannot be achieved satisfactorily.” 20 U.S.C. 1412(a)(5)(A) (emphasis added).

The regulations of the United States Department of Education implementing this provision require States to ensure that “[a] child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.” 34 C.F.R. 300.552(e). The State of Pennsylvania is at least as emphatic in its requirements: “Inclusion does not mean that special education students must have the same curricular goals as all other students.” *Penn. BEC* at 3. Pennsylvania instructs school districts that

[c]onsideration of the regular class must be the starting place for any decision-making about the placement of any special education student. This is both the law of the land and the policy of the [State] Department [of Education]. The preference creates a rebuttable presumption that the student will be educated in the regular class. The presumption is rebutted only if it is objectively determined that no set of services can feasibly be established to allow the child to succeed in the regular class. The courts have said that, in making this determination, factors such as class disruption, distortion of the curriculum for the class as a whole, and cost can be taken into account. It appears from the court decisions, however, that these factors will override the positive factors relating to the benefit to the child only in relatively rare cases.

Penn. BEC at 4-5.

This Court, in *Oberti*, incorporated this statutory presumption into the first prong of its test to determine whether an IEP satisfies the IDEA: Whether “education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily.” *Oberti*, 995 F.2d at 1215 (citation omitted). Contrary to the approach of the Appeals Panel, the fact that the goals for

a child are significantly different from the curriculum delivered to non-disabled students is simply not determinative of placement.

Research supports the wisdom of this Congressional mandate to educate students with disabilities in the LRE. McGregor, G. & Vogelsberg, R.T., *Inclusive Schooling Practices: A Synthesis of the Literature That Informs Best Practices About Inclusive Schooling* (1998). LRE data for students with mental retardation from the United States Department of Education's 22nd Annual Report to Congress indicates that IDEA investments produce increased access to the general education curriculum and increased school inclusion for students with disabilities.

Studies demonstrate that removing students with mental retardation from regular classrooms results in a fragmented approach to instruction in which general and special educators do not work together and individual student needs go unmet. Lipsky, D.K., & Gartner, A., Inclusive education: A requirement of a democratic society, in Daniels, H. & Garner, P., *Inclusive Education, World Yearbook of Education* (1999), 12-23; Sailor, W., Gee, K., & Karasoff, P., Inclusion and school restructuring, in Snell, M. & Brown, F., *Instruction of Students With Severe Disabilities* (5th ed. 2000), 1-30. Regardless of the severity of disability, children with mental retardation benefit from placement in a regular classroom where opportunities for inclusion with nondisabled peers are systematically planned and implemented. Gee, K., Least restrictive environment: Elementary and middle school, in *The National Council on Disability, Improving the Implementation of the Individuals With Disabilities Education Act: Making Schools Work for All Children*

(1996 Supplement), 395-425; Giangreco, M.F., & Doyle, M.B., Curricular and instructional considerations for teaching students with disabilities in general education classrooms, in Wade, S.E., *Inclusive Education: A Casebook and Readings for Prospective and Practicing Teachers* (2000), 51-70; Halvorsen, A.T., & Sailor, W., Integration of students with severe and profound disabilities: a review of research, in Gaylord-Ross, R., *Issues and Research in Special Education* (1990), 110-172.

Academic and social educational outcomes for students are significantly improved in inclusive settings. For example, academic engagement rates of students with severe disabilities were comparable to their non-disabled peers in inclusive classrooms. In a comparison of students with severe disabilities in classes in inclusive schools and in self-contained classes, students in inclusive placements had higher levels of social contact with peers, gave and received higher levels of social support, and had larger friendships networks. Fryxell, D., & Kennedy, C.H., Placement along the continuum of services and its impact on students' social relationships, in *The Journal of the Association for Persons with Severe Handicaps (JASH)* (1995), 20, 259-269. Direct observation and IEP analysis in segregated and inclusive classes found that: (a) the quality of IEP's for students with disabilities favored those in inclusive settings; (b) students in inclusive settings had higher levels of engagement in school activities, engaging in different types of activities than peers in self-contained classes; and (c) students with disabilities had higher levels of social interaction in inclusive programs. Hunt,

P., Staub, Alwell, M., & Goetz, L., Achievement by all students within the context of cooperative learning groups, in *JASH* (1994), 19, 290-301. In elementary classes, when students with severe disabilities and their nondisabled peers worked in cooperative learning groups, reciprocal interactions and initiation of interaction by students with severe disabilities increased while assisted interactions with paraprofessionals decreased. Hunt, P., Alwell, M., Ferron, Davis, F., & Goetz, L., Creating socially supportive environments for fully included students who experience multiple disabilities (1996), in *JASH*, 21, 53-71.

The IDEA requires that these opportunities be provided unless “education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. 1412(a)(5)(A).

B. *The District Court Correctly Determined That the Appeals Panel Decided this Case Pursuant to an Improper Legal Standard.*

The Appeals Panel did not base its conclusion that Spike should receive his core education in an LSS classroom on a determination that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, but on its determination that “the sixth grade regular academic curriculum is so far beyond [Spike’s] instructional level, it cannot be modified or adapted to meet his needs” (A427). Likewise, Valley Grove failed to develop an IEP based on Spike’s specific needs and did not attempt to implement his IEP in regular classes with the use of supplementary aids and services.

Rather than determining whether supplementary aids and services could be used to keep Spike in the regular classroom, Valley Grove and the Appeals Panel ignored this inquiry and improperly focused on the difference between the regular curriculum and Spike's capabilities. The basis for the Appeals Panel's decision turns the IDEA presumption of educating children with disabilities in the regular classroom on its head. The IDEA does not provide that a child with a disability must be placed in a separate classroom unless he or she can handle the grade level work in an age-appropriate regular classroom. The IDEA requires an individualized education program based on a child's specific needs and presumes placement in a non-segregated setting if educationally possible.

The Appeals Panel standard, contrary to Congress' statutory LRE mandate, would severely limit the ability of children with disabilities to be educated with their non-disabled peers. It would result in the exclusion of many children with retardation, like Spike, from regular education classrooms at a very early age, since some children with disabilities may never achieve at grade level. Therefore, the district court correctly found that "the Appeals Panel's focus on the gap between Spike's abilities and the demands of the sixth grade curriculum was erroneous." *Girty*, 163 F. Supp. 2d at 535.

Valley Grove argues that *Doe v. Arlington County School Board*, 41 F. Supp. 2d 599 (E.D. Va. 1999) (*Doe*) supports its decision to place Spike in the LSS (Br. 39). *Doe* does not help the school system here. The IDEA requires a focus on the *unique needs* of a disabled child. 20 U.S.C. 1400(d)(1)(A). The fact that the

unique needs of the child in *Doe* required education in an LSS says absolutely nothing about whether Spike's unique needs require education in an LSS. While both Spike and the child in *Doe* are eligible under the IDEA because of mental retardation, see *Doe*, 41 F. Supp. 2d at 601, the disability of the child in *Doe* is complicated by attention deficit hyperactivity disorder, *id.* at 601, a condition that makes the regular classroom too distracting for her. *Id.* at 605. While Spike can do his own work in the regular classroom, the child in *Doe* refused to do her work in a regular classroom. *Ibid.* At bottom, whereas Spike demonstrated, and the district court found, that Spike could benefit both academically and socially from placement in the regular classroom, the school district in *Doe* tried adaptations and modifications in the regular classroom for the child and they simply did not work. *Ibid.*

II

THE DISTRICT COURT CORRECTLY DETERMINED THAT VALLEY GROVE DID NOT SHOW THAT SPIKE COULD NOT BE EDUCATED SATISFACTORILY IN A REGULAR EDUCATION SETTING WITH SUPPLEMENTARY AIDS AND SERVICES

The district court properly applied the IDEA and correctly held that Valley Grove had not demonstrated that because Spike is mentally retarded, he cannot be educated satisfactorily in a regular classroom with supplementary aids and services. In so doing, the court carefully considered each of the factors that *Oberti* requires

be considered in making this determination, and properly assessed the potential use of inclusive programs.

A. *The District Court's Finding That Valley Grove Failed to Give Requisite Consideration to Including Spike in the Regular Education Classroom with Supplementary Aids and Services Is Not Clearly Erroneous.*

The district court recognized that a school district must first consider the whole range of supplemental aids and services to educate a child with a disability in the regular classroom. *Girty*, 163 F. Supp. 2d at 534, citing *Oberti*, 995 F.2d at 1216. The facts presented at the due process hearing through the testimony of Valley Grove personnel, as found by the hearing officer, clearly support the district court's finding that Valley Grove failed to give proper consideration to including Spike in the regular classroom with supplementary aids and services. The district court carefully examined the treatment that Valley Grove had actually provided to Spike during the time he was educated in the regular classroom in fourth and fifth grade, and found that it did not fully satisfy the IDEA, for the following reasons: Assignment of responsibility for Spike's education to his aide who was not a teacher; failure of the regular education teachers to consult with anyone from the IU or to receive special education training or support; understanding of teachers that the primary, if not entire, responsibility for working with Spike on IEP goals rested with the aide and not Spike's teachers; because regular classroom teachers were not provided with special education training, these teachers were not in position to modify the curriculum; failure of Spike's teachers to make meaningful attempts to include Spike in planned activities; and failure to implement systematic

supervision of the aide. *Girty*, 163 F. Supp. 2d at 534-535. This evidence supports the court's conclusion that Valley Grove "did not meaningfully attempt to instruct [Spike] inclusively as required under the IDEA." *Id.* at 535.

The district court correctly found that the Appeals Panel's focus on the fact that the sixth grade curriculum could not be modified or adapted to meet Spike's needs was improper.^{5/} As set forth above, the court's finding is consistent with the IDEA, Department of Education regulations and the Pennsylvania Basic Education Circular. Accordingly, the district court correctly determined that Valley Grove failed to show that Spike would not continue to progress if he were educated in the regular classroom with proper supplementary aids and services, and so properly concluded that Valley Grove failed to show that the IDEA's presumption of placement in a regular classroom does not apply here.

B. *The District Court's Finding That Spike Could Make Academic Progress in Regular Education Is Not Clearly Erroneous.*

The district court found a strict comparison between the educational benefits Spike would receive in regular education with supplementary aids and services and the benefits Spike would receive in a segregated special education classroom to be impossible because of Valley Grove's failure to provide proper supplementary aids and services to Spike under his existing IEP. "Nonetheless, every school official,

^{5/} The parents were not seeking to have the sixth grade curriculum modified for other children in Spike's class. See A231; A270.

teacher and expert who testified indicated that Spike made academic progress in regular education.” *Girty*, 163 F. Supp. 2d at 535.

The Appeals Panel expressed a belief that Spike has needs “that will not be met by the academic portion of the regular education curriculum” (A428). The Appeals Panel misinterprets IDEA’s general curriculum requirement. The IDEA does not require Spike to learn at the academic level of his non-disabled peers. As this Court has recognized, disabled children “may benefit differently from education in the regular classroom than other students.” *Oberti*, 995 F.2d at 1217. The IDEA recognizes that while children with disabilities may not perform at grade level for their age, “special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs *only* when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. 1412(a)(5)(A) (emphasis added). The district court correctly recognized that the Appeals Panel “fail[ed] to take into account the undisputed testimony that Spike did in fact progress both academically and socially in regular education and was achieving at a level appropriate for him.” *Girty*, 163 F. Supp. 2d at 536. Based on this finding, the district court’s conclusion that “[g]iven that [supplementary aids and services] have not been attempted and that Spike has progressed in regular education even without appropriate supplements, we find that Spike would receive adequate educational benefit in a regular education setting with appropriate supplementary aids and services,” *ibid.*, is clearly correct.

Valley Grove and the Appeals Panel lost sight of the fact that “the court must pay special attention to those unique benefits the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment, *i.e.*, the development of social and communication skills from interaction with nondisabled peers.” *Oberti*, 995 F.2d at 1216. As Spike’s mother testified, “Spike developed friendships and improved his language and social behavior while in regular education.” *Girty*, 163 F. Supp. 2d at 535. Spike’s parents also expressed their concern that Spike not lose the educational benefit of remaining in the regular classroom he had attended for two consecutive school years. Their concerns were based not only on the value of continuity in an environment where all agreed that Spike had made academic progress for two years, but also because they believed he had benefitted from attending his neighborhood school, which is in a community where he knows his peers both in and out of the classroom (*i.e.*, through Boy Scouts and other activities). That Spike had relationships with his classmates and would benefit from continued contact with them, rather than be placed in a school that was not in his community, was an additional important factor. Spike’s continued attendance at his neighborhood school is significant under the Department of Education regulations that require consideration of the neighborhood school of a child with a disability when determining his placement. See 34 C.F.R. 300.552(b)(3) and (c). Researchers have found that disabled students placed in neighborhood schools had improved in-school and after school integration, fewer behavior problems, and significantly higher levels of integration

than students enrolled in cluster. McDonnell, J., Hardman, M., Hightower, J., & Kiefer-O'Donnell, R., Variables associated with in-school and after-school integration of secondary students with severe disabilities, *Education and Training in Mental Retardation* (1991), 243-257.

C. *The District Court's Finding That Spike's Presence Would Not Adversely Affect the Regular Classroom Is Not Clearly Erroneous.*

With regard to the third *Oberti* factor, whether Spike's inclusion is likely to have a negative effect on the education of the other children in the regular classroom, the district court held that "the record is clear in this case that Spike is not disruptive, and the District has conceded that Spike is not a behavioral problem and that this factor is not an issue." *Girty*, 163 F. Supp. 2d at 536. The Appeals Panel did not make a finding on this *Oberti* factor (see A422-429), as Valley Grove did not argue that Spike's presence would have an adverse impact on the regular classroom.

Valley Grove concedes that it does not claim that Spike causes excessive disruption in class, but argues that "the court should also consider 'whether the child's disabilities will demand so much of the teacher's attention that the teacher will be required to ignore other students'" (Br. 41 (quoting *Oberti*, 995 F.2d at 1217)). The evidence gathered in the administrative proceedings on which the district court relied, however, demonstrates not only that Spike was not a behavioral problem, but also that other children in the class helped and showed compassion toward Spike, and that his presence in the classroom – rather than

detering other children from learning – had benefitted those children. Compare *Oberti*, 995 F.2d at 1217. By contrast, Valley Grove’s argument that Spike would be a hindrance to other children is based on its speculation that another child with a disability could be placed in the class with Spike, forcing the teacher “to spend a disproportionate amount of his or her time teaching curricula to two students which are materially different from the regular education curriculum being taught to the remainder of the class” (Br. at 42). It further speculates that “Spike’s inclusion in the regular education classroom *could very possibly have* a negative effect on the other students in the class” (Br. at 43 (emphasis added)). The district court’s finding, based not on speculation but on the historical evidence of the effect of Spike’s presence on the regular classroom in which he was educated, is correct.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH
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I, Clay G. Guthridge, counsel for amicus curiae United States, certify that this brief conforms to the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 6912 words and has been prepared in proportionally spaced typeface using WordPerfect 9 software in Times New Roman typeface, 14 point type. I relied on my word processor to count the words.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF SERVICE

I hereby certify that on this day of June, 2002, two copies of the Brief for the United States as Amicus Curiae Supporting Appellees were mailed first class mail to the following counsel of record:

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